Dr Mathew Sebastian v Metroplex Leasing & Credit Corp Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6-23-155-87
KC VOHRAH J
15 JULY 1996

Civil Procedure *— Attachment — Wrongful — Whether bailiff acting as agent of the defendant or as officer of the court — Whether defendant liable for trespass — Whether damages can be sought for wrongful attachment — Whether general damages can be claimed for manner in which attachment was carried out*

In 1985 the plaintiff, a dental surgeon, had entered into a lease agreement with the defendant for a set of X-ray equipment. On 6 March 1986, judgment in default of appearance was obtained against the plaintiff on a writ which alleged that the lease agreement had been terminated for non-payment of lease rentals. On 31 July 1986, a writ of sale and seizure ('the writ') dated 24 July 1986 was executed on the premises. As a result of the execution, the premises were sealed off and locked up by the bailiff, a person who said that he was from a lawyer's office and several security guards.The front portion which housed a pharmacy, wherein the plaintiff was a director, was also locked up. The plaintiff was deprived of the use of the premises from 31 July 1986 to 7 October 1986, ie when the writ was lifted by the High Court. The plaintiff brought a claim for loss and damages against the defendant alleging that the defendant through its agent and servant committed trepass in respect of the plaintiff's property. The plaintiff also claimed for the loss of the cost of renovations carried out at the premises and for the cost of the renovations carried out at the new premises. General damages were also claimed as it was alleged that the trespass was committed in a high-handed and vindictive manner. The defendant denied that it was on its instructions that the premises were closed and asserted that it was the bailiff, as an agent of the court, who sealed off the premises.

Held, allowing part of the claim:

(1) Generally a bailiff and a bailiff's officer, in executing a judgment of the court, are acting on behalf of the court and each is doing his duty as an officer of the court, and is not a servant or agent of the plaintiff who has recovered judgment in the action. There may however be circumstances to show that the plaintiff, by intervention, has made the bailiff his agent to do something which is not covered by the judgment or by the writ of execution (see p 562D–G); *William v William & Anor* [1937] 2 All ER 559 followed.

(2) In this case however, when the premises were closed by the bailiff and when he went to execute the writ of seizure and sale at the premises of the plaintiff, it was more probable that he had acted on the instructions of the defendant to lock up the premises.

A The defendant therefore was clearly liable for trespass (see p 562H); *Marian Rebello v Periathamby* [1931–32] FMSLR 37 followed.

(3) The plaintiff's claim for costs of renovation done at the premises and costs of basic renovations at the new premises failed because
B it was supported by evidence which was vague and had no basis in law (see p 563B).

(4) The claim for general damages also failed as no legal basis had been advanced for such claim (see p 563C).

C **[Bahasa Malaysia summary**

Dalam tahun 1985 plaintif, seorang doktor gigi, telah memasuki suatu perjanjian pajakan dengan defendan untuk suatu set peralatan X-ray. Pada 6 Mac 1986 penghakiman ingkar kerana ketidakhadiran telah diperolehi terhadap plaintif atas writ yang mendakwa bahawa
D perjanjian pajakan telah ditamatkan kerana kegagalan pembayaran sewaan pajakan. Pada 31 Julai 1986, suatu writ penyitaan dan penjualan ('writ tersebut') bertarikh 24 Julai 1986 telah dilaksanakan atas premis plaintif ('premis tersebut'). Akibat daripada perlaksanaan tersebut, premis tersebut telah ditutup dan dikunci oleh bailif, seorang yang mengatakan bahawa dia adalah dari sebuah firma peguam dan
E beberapa orang pengawal keselamatan. Bahagian hadapan yang mengandungi suatu farmasi, di mana plaintif adalah seorang pengarah, juga telah dikunci. Plaintif telah kehilangan penggunaan premis tersebut dari 31 Julai 1986 sehingga 7 Oktober 1986, iaitu apabila writ tersebut telah dibatalkan oleh Mahkamah Tinggi. Plaintif telah menuntut kehilangan dan kerugian terhadap defendan dan mendakwa
F bahawa defendan melalui ejen atau pekerjanya telah melakukan pencerobohan ke atas premis tersebut. Plaintif juga telah mendakwa untuk kerugian disebabkan kos pengubahsuaian yang telah dilakukan di premis tersebut dan juga untuk kos pengubahsuaian asas yang telah dilakukan di premis yang baru. Ganti rugi am juga telah dituntut
G atas dasar bahawa pencerobohan yang dilakukan itu telah dilakukan secara kasar dan berdendam. Defendan telah menafikan bahawa premis tersebut telah ditutup atas arahannya dan mengatakan bahawa adalah bailif, sebagai ejen mahkamah, yang telah menutup premis tersebut.

H **Diputuskan**, membenarkan sebahagian daripada tuntutan:

(1) Pada amnya seseorang bailif dan pegawai bailif, dalam melaksanakan penghakiman mahkamah, bertindak bagi pihak mahkamah dan setiap orang daripada mereka melakukan tugasnya sebagai pegawai mahkamah, dan mereka bukan merupakan
I pekerja ataupun ejen plaintif yang telah mendapatkan penghakiman dalam tindakan tersebut. Walau bagaimanapun, mungkin terdapat keadaan yang menunjukkan bahawa plaintif, dengan campur tangannya, telah melantik bailif sebagai ejennya

untuk melakukan sesuatu yang tidak diliputi oleh penghakiman ataupun writ perlaksanaan (lihat ms 562D–G); *William v William & Anor* [1937] 2 All ER 559 diikut.

(2) Walau bagaimanapun dalam kes ini, ketika premis tersebut ditutup oleh bailif dan ketika dia melaksanakan writ penyitaan dan penjualan atas premis plaintif, dia telah melakukannya atas arahan defendan untuk mengunci premis tersebut. Maka defendan jelas adalah bertanggungan untuk pencerobohan (lihat ms 562H); *Marian Rebello v Periathamby* [1931–32] FMSLR 37 diikut.

(3) Tuntutan plaintif untuk kos pengubahsuaian yang dilakukan di premis tersebut dan untuk kos pengubahsuaian asas di premis baru gagal kerana ianya hanya disokong oleh keterangan yang kurang jelas dan ianya tidak mempunyai apa-apa dasar di sisi undang-undang (lihat ms 563B).

(4) Tuntutan untuk ganti rugi am juga gagal kerana tidak terdapat dasar di sisi undang-undang yang dikemukakan untuk tuntutan tersebut (lihat ms 563C).]

Notes

For cases on wrongful attachment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue), paras 759–760.

Cases referred to

Marian Rebello v Periathamby [1931–1932] FMLSR 37
William v William & Anor [1937] 2 All ER 559

Christopher Fernando (*Aris Rizal Christopher Fernando & Co*) for the plaintiff.

Philip Chai (*Soo Thien Ming & Nashrah*) for the defendant.

Cur Adv Vult

KC Vohrah J: The plaintiff's cause of action as appears in paras 4 and 5 of the statement of claim is that on 31 July 1986, the defendant, through its servants and agents, attached the moveable property of the plaintiff by means of a writ of seizure and sale dated 24 July 1986 in excess of the powers conferred under the said writ and that they committed trespass in respect of the plaintiff's property when they locked up the back portion of the said premises, thereby depriving the plaintiff of the enjoyment of the said premises.

By paras 6 and 7 of the statement of claim, the plaintiff pleads that he has suffered loss and damage by way of:

(1) Loss of use and enjoyment of the premises from 31 July 1986 to 7 October 1986;

(2) Loss of business on account of the closure of the premises;

A (3) Loss of goodwill and reputation of the business; and

(4) Consequential loss and damage arising therefrom.

The plaintiff is a dental surgeon and at the material time was having his dental surgery at the back portion of premises at no 55, Jalan Thambipillai, Brickfields, Kuala Lumpur, where he had a tenancy of the whole of the B ground floor. In 1985, with the consent of the defendant who had originally leased a set of X-ray equipment to a doctor, the interest of the doctor in the equipment was assigned to the plaintiff who entered into a lease agreement for the equipment with the defendant.

Judgment in default of appearance was obtained against the plaintiff C on 6 March 1986 on a writ which alleged that the lease agreement had been terminated for non-payment of lease rentals in accordance with the lease agreement. It was for the amount of RM56,737.53.

On 31 July 1986, a writ of seizure and sale dated 24 July 1986 was executed on the plaintiff's premises at Brickfields. The evidence is clear D and undisputed that as a result of the said execution the premises were sealed off and locked up and as a result the plaintiff was deprived of the use of the premises from 31 July 1986 to 7 October 1986 — ie when the writ of seizure and sale was lifted by the High Court.

The evidence of the plaintiff was that at about 2pm on that day, eight E or nine persons, who included the bailiff and a person who said he was from a lawyer's office and several security guards, came to his surgery while he was attending to a patient. The bailiff told him that they had a court order on a case brought against him by Metroplex Leasing. The plaintiff testified that the person from the lawyer's firm told him that they had come with the court order (the writ of seizure and sale) and that the F instruction from Metroplex was to close the premises. The bailiff then told him that he had to make a list of all the assets at the premises and he proceeded to do so. After he had finished he asked the plaintiff to clear out. The premises were then locked up. The plaintiff stated that he was there to the end and that they had additional locks and had locked up the premises. The front premises, which housed a pharmacy, Cosmopolitan G Company, was also locked up and he was told, evidence which he did not challenge, that it was closed because they had come to know that he was a director of the company. This piece of information about the plaintiff being a director of the company is hardly the sort of information that a court official, ie the bailiff, would have known of.

H The following day the plaintiff went to the defendant's premises at Wisma Equity with one Encik Karupillai. His evidence was that he saw a manager there, a Mr Wong, and requested him to open up the premises and told him he had entrusted the matter to a lawyer. Mr Wong rebuffed him and said, 'You can go and fight us if you want and we are ready to face I the consequences.' Encik Karupillai confirmed the meeting and the fact that Mr Wong did not agree to the opening up of the premises.

There can be no doubt that the plaintiff's premises were locked up as claimed by the plaintiff. The defendant denied that it was on its instructions

that the premises were closed and asserted that it was the bailiff who closed up the premises. The evidence of the witness who was then a clerk in the law firm that was engaged by the defendant, called by the defence, was that he followed the bailiff to the premises and when there was no settlement of the judgment sum the bailiff proceeded to make an inventory of the assets there and then locked up the premises. He said he did not give any instruction to lock nor did he know why the bailiff locked up the premises. I find that evidence, coming from a former lawyer's clerk, hard to believe. A senior partner of the law firm, who was the only other witness for the defence, who appeared to be unfamiliar with the case stated he did not give any instruction for the premises to be locked. Having heard and seen the witnesses and having regard to all the evidence that was adduced, my view is that it is more probable that the premises were locked up on the defendant's instruction. It should be noted that while one of the defendant's witnesses, ie the former lawyer's clerk, asserted that the locking up of the premises was done by the bailiff and not on the instruction of the defendant, the defendant did call the bailiff to give evidence to that effect.

In *William v William & Anor* [1937] 2 All ER 559 the English Court of Appeal, in dealing with an action for wrongful eviction and damages for trespass, allowed an appeal from a decision of a county court awarding damages to the plaintiff for trespass against the landlord. The Court of Appeal was of the view that the landlord, although present at the eviction, had not taken any part in it, or given the sheriff's officer any such direction to have made him his agent. The landlord was therefore not liable.

Greer LJ, while dealing with English law that a sheriff and a sheriff's officer, executing a judgment of the court, are acting on behalf of the court and that each is doing his duty as an officer of the court, and is not a servant or agent of the plaintiff who has recovered judgment in the action, went on to state at p 561:

> ... Of course, there may be circumstances which show that the plaintiff by intervention had made the sheriff his agent to do something which was not covered by the judgment, or by the writ of execution. If I had thought that what had happened in this case amounted to that, or that the county court judge had found as a fact that the landlord ... had interfered, and requested the sheriff's officer to execute the judgment on property upon which he was not entitled to execute the judgment, then the judge would have been right.

My view is that when the premises were closed by the sheriff's officer, the bailiff, when he went to execute the writ of seizure and sale at the premises of the plaintiff, acted on the instructions of the defendant to lock up the premises. The defendant is clearly liable for the trespass (see also *Marian Rebello v Periathamby* [1931–32] FMSLR 37).

The plaintiff has claimed special and general damages. He claimed for the loss of the use of and enjoyment of the premises for about three months at RM1,200 (a total of RM3,600) which I allow. There was a loss of business on account of the closure of the premises. He said he has about 15 patients a day and his gross income is about RM8,000–RM9,000 per month and that these claims appear reasonable. He had two clinic nurses

A and his evidence was that their salaries and overhead charges amount to about RM2,300 a month, again these being reasonable claims. I allow the sum of RM18,6000 being loss of business on account of the closure of the premises for about three months, ie [(RM8,000 + RM9,000) ÷ 2 less RM2,300] x 3 months.

B In his written submission the plaintiff claimed loss of the cost of renovation carried out at the premises (which included the furniture, built-in cabinets, etc) and for the cost of basic renovation carried out at the new premises. The evidence advanced for these claims or for claim for the additional cost of moving to new premises was vague and had no basis in law.

C In relation to the claim for general damages on the basis that the trespass was committed in a high handed and vindictive manner against the plaintiff who is a professional man, there is again no legal basis advanced for this head of damages.

In the result, the plaintiff succeeds in his cause of action and damages D in the sum of RM3,600 for the loss of use and enjoyment of the premises and in the sum of RM18,600 for loss of income with costs are awarded to to the plaintiff.

Claim partly allowed.

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Reported by Lew Chee Seong

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